Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ARUNA KAVALI,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 11, 2008

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QUESTION PRESENTED FOR REVIEW

Did Petitioner receive ineffective assistance of counsel at trial?

PARTIES TO THE PROCEEDINGS

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

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Kavali v. Quarterman, No. 08-40368 (5th Cir. 2009) (unpublished) (Appendix A)

Kavali v. Quarterman, No. 4:05-CV-124 (U. S. Dist. Court, E. D. Tex. 2008) District Court Order, Appendix B; Magistrate's Report, Appendix C.

JURISDICTIONAL BASIS

Jurisdiction for this Petition is based on 28 U.S.C. §1254. The Order of the United States Court of Appeals For the Fifth Circuit denying Petitioner's request for a certificate of appealability was issued on March 16, 2009.

CONSTITUTIONAL PROVISIONS

U. S. Const., amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U. S. Const., amend. XIV, Sect. 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner was indicted for capital murder in cause number 380-80476-01 in the 380th District Court of Collin County, Texas. She pled not guilty. A jury convicted her, and the court assessed punishment at life imprisonment on March 4, 2001.[1]

The Fifth Court of Appeals of Texas affirmed the conviction in an unpublished opinion issued on November 4, 2002 (AX1). The Court of Criminal Appeals refused discretionary review on June 11, 2003. The United States Supreme Court denied certiorari on October 20, 2003. *Kavali v. State*, No. 05-01-00835-CR (Tex. App.-Dallas 2002, pet. ref'd), *cert. denied*, 540 U.S. 967 (2003).

Petitioner filed a state habeas corpus application on September 16, 2004 raising ineffective assistance of counsel under the United States Constitution. The state district court, without conducting an evidentiary

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[1] The State did not seek the death penalty.

hearing, signed the State's proposed findings of fact and conclusions of law verbatim and recommended that relief be denied. The Texas Court of Criminal Appeals denied relief without written order on March 2, 2005. Petitioner filed this Federal action under 28 U.S.C. §2254. The Federal District Court denied relief on March 19, 2008. On March 16, 2009, the United States Court of Appeals for the Fifth Circuit denied the Petitioner's Application for a Certificate of Appealability.

B. Statement of Facts

Petitioner was indicted for the offense of Capital Murder by indictment that alleged that she caused the death of Venkateswar Kavali, a child under 6 years of age. The indictment alleged various means of the offense being committed, including choking and striking the child and causing the child's skull to fracture, and causing the child to ingest glass particles, and committing an act clearly dangerous to a human life by choking and striking the child and causing the child to ingest glass particles. (CR 1, p. 2-3; CR 2, p. 267-272).

ARGUMENT

The state court judgment in this case involved a misapplication of *Strickland v. Washington*, 466 U.S. 668 (1984). The Federal District Court likewise misapplied *Strickland* and the Court of Appeals erred in not granting a certificate of appealability.

Standard for Issuance of Certificate of Appealability

A certificate of appealability should issue if Petitioner made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Petitioner must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issue (in a different manner); or that questions are adequate to deserve encouragement to proceed further." *Drinkert v. Johnson*, 97 F.3d 751, 755 (5th Cir.), *cert. denied*, 117 S.Ct. 1114 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n.4, 77 L.Ed.2d 1090 (1983)); *accord*, *Lozada v. Deeds*, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991). "[A] claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. at 337. Any doubts about whether to issue a certificate of appealability should be resolved in favor of Petitioner. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997).

Ineffective Assistance of Counsel - Governing Law

It is well established that a defendant is entitled to the effective assistance of counsel as required by the Sixth and Fourteenth Amendments. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Effective assistance is denied if, "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668 (1984).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. That is, "a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Strickland*, 466 U.S. at 687). This in not an outcome-determinative test. *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). The question is not whether a defendant would have more likely than not received a different verdict but for counsel's performance, but whether, "he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 454, 115 S.Ct. 419, 131 L.Ed. 2d 490 (1995).[2]

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[2] Although *Kyles* involves the determination of prejudice following the State's suppression of evidence favorable to the defense (*Brady* error) (*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963)) the standard for prejudice employed in such cases is adopted from, and is identical to, that in *Strickland*. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985). In both circumstances, to demonstrate prejudice, a petitioner must show that "there is a reasonable probability that . . . the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-434 (quoting *Bagley*, 473 U.S. at 682).

Deficient Performance

1. **Counsel failed to object when the prosecutor incorrectly argued during summation that the jury could convict Petitioner of capital murder if she engaged in conduct that constituted hindering apprehension or prosecution.**

The theory of defense was that Petitioner's husband killed the baby, established his alibi, and set up Petitioner. Defense counsel argued during summation that Mr. Kavali fed glass to the baby while Petitioner was taking a nap; went to Wal-Mart and made the first purchase; returned home and found that the baby was still alive; choked and beat the baby and left him outside the apartment; went to Babies 'R Us and made the second purchase; and then called Petitioner on his cell phone and asked about the baby. After she went outside and found the baby, he told her what to tell everyone (6 R.R. 26, 28-29). The prosecutor argued in rebuttal that even if the jury believed "this crazy, made-up story," Petitioner was guilty of capital murder as a party because she helped Mr. Kavali create his alibi by lying to the police (6 R.R. 33; AX 15). Defense counsel did not object that the argument misstated the law contrary to the court's charge.

Under Texas law, a conviction must be reversed where the court, during summation, allows the prosecutor, over objection to misstate the law contrary to the court's charge. *Davis v. State*, 506 S.W.2d 909 (Tex. Crim. App. 1974) (prosecutor improperly argued that defendant forfeited right to rely on defense of accident because he was engaged in unlawful act at time of shooting). A wife who is present when her

husband kills their child and thereafter tries to help him avoid detection by lying to the police cannot be convicted as a party to the murder; helping the perpetrator cover up the crime constitutes only hindering apprehension or prosecution. *Easter v. State*, 536 S.W.2d 223, 225-29 (Tex. Crim. App. 1976). Thus, if Mr. Kavali killed the baby without Petitioner's assistance but she helped him create his alibi by lying to the police, she would be guilty of hindering apprehension or prosecution rather than capital murder.

The prosecutor incorrectly advised the jury, in essence, that it could convict Petitioner of capital murder on facts that constituted only a misdemeanor.[3] Defense counsel's failure to object to this egregiously improper argument that was contrary to the court's charge constituted deficient performance.

Neither the State nor the state habeas court dispute that the prosecutor's argument constituted an incorrect statement of Texas law. However, the court adopted the State's proposed findings that the argument "was merely an unrehearsed response to applicant's surprise closing argument" and, at worst, "the prosecutor simply misspoke;" it concluded that counsel was not deficient in failing to object (S.H.R. 254-59). The state court unreasonably applied *Strickland*, as counsel is clearly ineffective where he fails to object to egregiously improper argument that is contrary to the court's charge. *See Drinkert*, 821 S.W.2d at 955-56. The prejudice resulting from this

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[3] Hindering apprehension or prosecution is a Class A misdemeanor. *See* TEX. PENAL CODE § 38.05(a) (West 1998).

improper argument, by itself, is sufficient to require habeas corpus relief.

2. Counsel failed to object to the State making prejudicial references to Petitioner's alleged religious and cultural beliefs.

Petitioner is from India. During the *voir dire* examination, the prosecutor asked a prospective juror to assume that a couple had "a religious or cultural belief that a baby with a defect or some type of deformity is ... better off dead [so] ... they kill the baby" (2 R.R. 36-38; AX 16). Defense counsel did not object to the prosecutor making this prejudicial reference to religious and cultural beliefs although he did comment, "Religious belief has nothing to do with this case and the allegations against this woman or her defense" (2 R.R. 38).[4]

The State called Joseph Elder during its case-in-chief. After he introduced himself as a Professor of Sociology in languages and the cultures of Asia at the University of Wisconsin and the Director of the Center for South Asia, the court retired the jury (5 R.R. 62). Elder testified outside the presence of the jury to various aspects of the Indian culture (5 R.R. 62-67). Defense counsel said that he did not have any objection except to one portion of the testimony (5 R.R. 68). Nonetheless, the court stated, "I think it's clear that the Constitution doesn't allow you to present

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[4] Defense counsel's comment could be interpreted to mean that Petitioner had the religious belief described by the prosecutor but it was unrelated to the offense.

racial characteristics to prove that something is more likely than not. I think it also applies to ethnicity, and I think this could be plain error" (5 R.R. 68). Co-counsel then responded that the defense was "changing our position" and "objecting to his entire testimony" (5 R.R. 68-69). The court sustained the objection (5 R.R. 73).

During summation, the prosecutor argued that Petitioner did not want to deal with the medical problems of a defective child, but "here in the United States you don't have that right ... to choose to get rid of the problem" (6 R.R. 35; AX 17). Defense counsel did not object to the prosecutor contrasting the alleged cultural beliefs of Indians with those of Americans.

The State's theme throughout the trial was that Indians have a religious or cultural belief that it is acceptable to kill a defective baby. During the *voir dire* examination, the prosecutor introduced this theme in the form of a hypothetical question. Although the State did not thereafter offer evidence that Indians have this belief, the jury likely reached that conclusion when the State called an expert in Indian culture in their presence and the court, after a hearing outside their presence, excluded his testimony. To ensure that the jurors reached this conclusion despite the lack of evidence, the prosecutor argued during summation that Petitioner did not have the right "here in the United States" to get rid of a defective baby, implying that this right existed in India. Defense counsel failed to object to these improper references to Petitioner's alleged religious and cultural beliefs.

The United States Supreme Court has recognized the harm that results from the introduction of race into the criminal justice system. The Court observed in *McClesky v. Kemp*, 481 U.S. 279, 309-10 (1987) (citations omitted):

> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system.... Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury ...is a vital principle, underlying the whole administration of criminal justice.... Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."

Argument appealing to ethnic prejudice constitutes plain error.[5] In *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990), the prosecutor argued without objection that Jamaican drug dealers were taking over the sale of crack in the city. The court of appeals observed that appeals to racial passion "distort the search for truth and drastically affect a juror's partiality." *Id.* at 25. When the argument "shifts its emphasis from evidence to emotion...it matters not whether the reference is to race, ancestry or ethnic background." *Id.* Ethnic comments are "especially egregious because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the

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[5] The United States Supreme Court has cautioned trial judges to stop argument of this nature without waiting for an objection. *Viereck v. United States*, 318 U.S. 236, 248 (1943).

prestige associated with his office, but also because of the fact-finding facilities presumably available to him." *Id.* at 28.

The State improperly suggested to the jury, in the absence of evidence, that Indians have a religious or cultural belief that a defective baby is better off dead, that Petitioner acted on this belief in killing her baby, and that the jury should convict her to show that she did not have the right "here in the United States" to kill a defective baby. Defense counsel's failure to object to these improper references to Petitioner's alleged religious and cultural beliefs constituted deficient performance.

The state habeas court adopted the state's proposed findings that the prosecutor's references to culture and religion "were designed to eliminate them as a factor in the case" and did not constitute "any appeal, direct or subtle, to racial prejudice" (S.H.R. 256); it concluded that counsel was not deficient in failing to object (S.H.R. 259). These findings and conclusions were based on unreasonable determinations of the facts in light of the record. It strains credulity to find that the prosecutor repeatedly mentioned Petitioner's alleged religious and cultural beliefs in this manner to ensure that the jury would not consider them in deciding the case. Argument that a person does not have the right to get rid of a defective child "here in the United States" is the antithesis of the state court's findings.

3. Counsel failed to present expert testimony to explain how Petitioner could have been the source of the blood on the carpet in the master bedroom that contained the baby's DNA.

The police seized a piece of carpet that contained three spots of blood from between the bed and the bathroom in the master bedroom and a bloody towel from the tub (4 R.R. 50-54). The blood on the carpet contained a mixture of the DNA of the baby and either Petitioner or Jyothi, her other child; the DNA in the blood on the towel could not be determined (5 R.R. 96, 101-02). Defense counsel elicited on cross-examination of the chemist that the presence of a person's DNA in blood does not mean that the person is the source of the blood; the DNA could be from the person's saliva or skin cells (5 R.R. 109-11). However, defense counsel did not present expert testimony to explain how the baby's DNA could be in Petitioner's blood. The prosecutor argued during summation that the DNA evidence proved that Petitioner's story to the police was false, as she did not say that she took the baby into the bedroom after she found him outside the apartment, yet his blood and DNA were in the bedroom (6 R.R. 39). The court of appeals, in holding that the evidence was legally sufficient to establish that Petitioner killed the baby, observed that the evidence "showed the baby's blood was on the bed and on the carpet in the master bedroom" (AX 1 at 4). Thus, both the prosecutor and the court of appeals assumed that because the baby's DNA was in the blood, it was his blood.

Petitioner told the police that she left the baby on the couch in the living room while she went to the

master bathroom; when she returned, the front door of the apartment was open, and he was laying on the porch, fatally injured. The police found evidence that Petitioner had vaginal bleeding; three spots of blood were on the carpet in the master bedroom and a bloody towel was in the master bathroom.

Because defense counsel failed to present expert testimony to explain how the baby's DNA could have been in Petitioner's blood, the prosecutor was able to make the misleading, but effective, argument that Petitioner injured the baby in the bedroom, causing him to bleed on the carpet.

Dr. Mark Jacobs, an obstetrician and gynecologist, reviewed this aspect of the case and provided an affidavit in the state habeas proceeding (AX 18). According to Dr. Jacobs, a baby sheds its skin cells and urine into amniotic fluid throughout its gestation. During labor, the amniotic sac ruptures, amniotic fluid is expelled, and the baby's skin comes into direct, vigorous contact with the uterine walls. The baby's skin cells are exfoliated and rubbed into the decidual (internal) surface of the uterine walls. After birth, the decidua sheds. It is reasonably likely that the shed decidua contains DNA from the baby's skin cells. The mother's vaginal secretions, which continue for days to weeks after birth, contain decidua, plasma, blood, and cellular material. It is reasonably likely that those secretions contain DNA from both the mother and the baby. There is a reasonable medical probability that if Petitioner bled vaginally onto the carpet in the bedroom three days after giving birth, her blood contained the baby's DNA. Had defense counsel presented expert testimony of this nature, the prosecutor could not have argued plausibly that the

DNA evidence proved that the baby was injured in the bedroom, contrary to Petitioner's statements to the police.

Counsel has a duty to conduct an adequate investigation and to discover and present relevant evidence. Counsel cannot make a reasonable strategic decision not to present evidence that he failed to discover as a result of an inadequate investigation. *Wiggins v. Smith*, 539 U.S. 510 (2003). Defense counsel's failure to discover and present this medical evidence constituted deficient performance.

The state habeas court adopted the State's proposed conclusion that counsel made a reasonable strategic decision not to explain the blood drop evidence, as it did not inculpate Petitioner nor exculpate her husband (S.H.R. 257-59). This conclusion ignores the prosecutor's argument that the DNA evidence proved that Petitioner's story to the police was false. Thus, the state court conclusion involved an unreasonable application of *Wiggins* and *Strickland*.

Prejudice

This was a classic circumstantial evidence murder case. The Kavalis' baby was killed at their apartment within hours after he came home from the hospital. There was no direct evidence that either parent killed him. Petitioner, instead of Mr. Kavali, was charged with murder because her statements to the police placed her alone with the baby and gave him an alibi for when the baby was injured. That Petitioner may have lied to the police about what happened does not mean that she killed the baby or was criminally

responsible for his death. A jury that heard all the relevant evidence, without being influenced by religious or ethnic prejudice and misadvised regarding the applicable law, should have acquitted her. Effective representation truly would have made a difference in this case.

The jury was not aware of crucial evidence relevant to Petitioner's credibility. Defense counsel failed to present expert testimony to explain how Petitioner's blood on the bedroom carpet could contain the baby's DNA. This testimony would have precluded the State from arguing that the DNA evidence proved that the baby was injured in the bedroom, contrary to Petitioner's statements to the police.

The jury was improperly influenced by the prosecutor's references to Petitioner's alleged religious and cultural beliefs. The prosecutor suggested during the *voir dire* examination and summation that a religious or cultural belief led Petitioner to kill her defective baby and argued that she did not have that right "here in the United States." It was reprehensible to refer to Petitioner's alleged religious and cultural beliefs as a basis to convict her, especially in the xenophobic times in which we live.

Defense counsel's most egregious error was his failure to object when the prosecutor misstated the law during summation. The prosecutor argued that even if the jury believed that Mr. Kavali killed the baby and framed Petitioner, she was guilty of capital murder as a party because she helped him create his alibi by lying to the police. The jury was improperly advised that it could convict Petitioner of capital murder on facts that constituted hindering apprehension or

prosecution, a misdemeanor. The prejudice resulting from this improper argument, by itself, is sufficient to require relief.

The jury may have believed that Mr. Kavali killed the baby without Petitioner's assistance but convicted her of capital murder as a party based on the prosecutor's argument that she helped him create his alibi by lying to the police. But for defense counsel's errors, there is a reasonable probability that the jury would have acquitted Petitioner or deadlocked. Had the court overruled timely objections to the prosecutor's improper comment during the *voir dire* examination and to the improper arguments, there is a reasonable probability that an appellate court would have reversed any conviction. A capital murder conviction obtained under these circumstances is not a verdict worthy of confidence. Accordingly, Petitioner is entitled to a new trial.

CONCLUSION

BASED ON THE FOREGOING ARGUMENTS, Petitioner pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

GARY A. UDASHEN
State Bar No. 20369590

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-40368
USDC No. 4:05-CV-124

[Filed March 16, 2009]

ARUNA KAVALI	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION	)
	)
Respondent-Appellee	)

Appeal from the United States District Court for the Eastern District of Texas

ORDER:

Aruna Kavali, Texas prisoner # 1043776, was convicted by a jury of capital murder and was sentenced to life in prison. She seeks a certificate of appealability (COA) to appeal the district court's

denial of her 28 U.S.C. § 2254 petition challenging this conviction. To obtain a COA, Kavali must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). She therefore must demonstrate "that jurists of reason could disagree with the district court's resolution of [her] constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 US. 322, 327 (2003).

Kavali does not repeat in her COA application her assertion that she was denied due process when she was not provided with an interpreter at trial, and this claim is thus deemed abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Kavali does assert, however, that her trial counsel rendered ineffective assistance by failing to object to the prosecutor's misstatement of law during closing arguments, by failing to object to the prosecutor's attack on Kavali's purported cultural or religious beliefs during voir dire and closing arguments, and by failing to present expert testimony at trial to explain the presence of DNA evidence. She has failed to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Consequently, Kavali's motion for a COA is DENIED.

/s/
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CIVIL ACTION NO. 4:05cv124

[Filed March 19, 2008]

ARUNA KAVALI, #1043776	)
	)
VS.	)
	)
DIRECTOR, TDCJ-CID	)
	)

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Don D. Bush, who issued a Report and Recommendation concluding that the petition for a writ of habeas corpus should be dismissed with prejudice. Petitioner has filed objections.

The Report of the Magistrate Judge, which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a *de novo* review of the objections raised by Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of

Petitioner are without merit. The objections simply serve to reurge the grounds contained in her petition and reply. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DISMISSED** with prejudice. A certificate of appealability is **DENIED.** It is further

ORDERED that all motions not previously ruled on are hereby **DENIED.**

SIGNED this 18th day of March, 2008.

/s/
RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CIVIL ACTION NO. 4:05cv124

[Filed February 26, 2008]

ARUNA KAVALI, #1043776	)
	)
VS.	)
	)
DIRECTOR, TDCJ-CID	)
	)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Aruna Kavali, an inmate confined in the Texas prison system, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Procedural History

On March 4, 2001, after pleading not guilty, a jury from the 380th District Court of Collin County convicted Petitioner of capital murder. She was sentenced to life in prison, Cause number

380-80476-01, *The State of Texas v. Aruna Kavali*. Petitioner appealed her conviction, and the Fifth Court of Appeals affirmed on November 4, 2002. After filing a petition for discretionary review, the Texas Court of Criminal Appeals refused review on June 11, 2003. The United States Supreme Court denied Petitioner's writ of certiorari on October 20, 2003. On September 16, 2004, Petitioner filed an application for state writ of habeas corpus challenging her conviction, which the Texas Court of Criminal Appeals denied without written order on March 2, 2005. Petitioner filed the instant petition on March 28, 2005.

Petitioner asserts that she is entitled to relief based on the denial of her right of confrontation and a fair trial, and the denial of effective assistance of counsel. The Attorney General provided a response, stating that Petitioner's claims are without merit.

Background

Portions from the opinion of the Fifth Court of Appeals are set out below:

> On December 6, 1999, appellant gave birth to a baby that was in perfect health but had irregular genitalia. Specifically, the baby's genitalia at first appeared female but, after a series of tests, a pediatric endocrinologist determined the baby was a male. The endocrinologist, Grace Tannin, discussed the situation with appellant and her husband and presented the option of raising the baby as a girl, though the baby would then require reconstructive surgery at a later date and would not be able to bear children. Alternatively, the

baby could be raised as a boy, but Tannin could not say with certainty that the baby would be able to produce sperm or father children. Appellant and her husband elected to raise the baby as a boy and took him home on December 8, 1999. That same day, the baby died of blunt force head injury and ligature strangulation. Appellant was convicted of murdering her baby, and this appeal followed.

In her first and second issues, appellant complains the evidence is legally and factually insufficient to support her capital murder conviction. When reviewing challenges to the legal and factual sufficiency of the evidence, we apply well known standards. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Johnson v. State*, 23S.W.3d 1, 11 (Tex. Crim. App. 2000); *see also Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The factfinder is the sole judge of the witnesses' credibility and their testimony's weight. *Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984). The factfinder may believe or disbelieve all or any part of any witness' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When reviewing a case comprised wholly of circumstantial evidence, the standard of review is the same as it is for reviewing cases in which direct evidence exists. *King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000). A person commits capital murder if he intentionally or knowingly causes the death of an individual under six years of age. *See* Tex. Pen. Code Ann. §§ 19.02(b)(1); 19.03(a)(8) (Vernon 1994).

In this case, the record shows appellant told police that she left her baby sitting alone on the couch and went to the bathroom for approximately two minutes. The door of the bathroom was closed, and appellant said she heard a knock at the front door. Appellant called out, but she did not hear anything. Appellant came out of the bathroom three minutes later and discovered her baby was no longer sitting on the couch, and the front door of the apartment was open. Appellant went outside and discovered her baby lying dead on the porch.

Johnny Lynn Rudder, a firefighter and paramedic, arrived at appellant's apartment about the same time as police and a fire engine. When he walked inside appellant's apartment, Rudder found appellant, her husband, and her daughter "kind of walking around." Everyone in the apartment "had sort of a flat look on their face." Rudder asked what was wrong, but nobody responded. However, they all looked toward a couch where Rudder saw a baby lying on its back. Jeffrey Surles, another paramedic, came in and took the baby outside to the ambulance where Rudder used a bag-valve mask to try to get the baby breathing. Rudder noticed the baby's head was "like a bag of water" with nothing solid along the top part of the skull. Rudder also discovered a red line on the baby's neck as if someone had used a cord to strangle it. Nevertheless, the baby's face was very clean as if it had just had a bath.

Collin county medical examiner William Rohr performed an autopsy on appellant's baby and determined the baby died from blunt force head injury and ligature strangulation. In addition, Rohr detected caffeine in the body and found fragments of green glass in the baby's mouth, stomach, and small intestine. David Walker Spence, supervisor of the trace evidence section at the Southwest Institute of Forensic Science testified the glass fragments found in the baby's body matched fragments in a mortar and pestle found in appellant's kitchen and the "P-traps" of two sinks in appellant's apartment.

Dallas police officer Frank Della testified the porch outside the door of appellant's apartment was clean, and the potted plants sitting on the porch were sitting upright. The record does not indicate that any physical evidence was recovered from the porch. Police recovered a latent palm print from the outside of the front door, but the print was not identified. Dallas police detective Daniel Krieter testified he could not tell how old the palm print was and that prints could remain on a surface indefinitely.

Timothy Kalafut, a forensic DNA analyst, testified he compared DNA samples from appellant, her baby, and her husband and daughter with blood samples taken from her apartment. On a sheet from the bed in appellant's master bedroom and on the carpet in the master bedroom, Kalafut found stains that were possibly a mixture of appellant's, her daughter's, and her baby's blood. Kalafut's DNA test indicated a male contributed to the

samples, and the only other male in the family, appellant's husband, was excluded. Kalafut also tested a bloodstain found on a wet towel in appellant's master bathroom, but he was unable to isolate any DNA from the towel because it was too wet. Thus, the evidence developed at trial showed the baby's blood was on the bed and on the carpet in the master bedroom.

In appellant's apartment, a mortar and pestle was found containing glass fragments matching those found in the baby's body - glass fragments that had time to travel through the baby's body and into the baby's small intestine. Rohr testified the glass fragments would not necessarily have stopped moving through the baby's system at death; however, Rohr had only seen one example of such movement after death and never in an infant. Rohr testified the glass had to be in the baby "for some time," but he agreed there was no way to tell how long. Despite the severity of the baby's head injury, the baby appeared clean as if it had just had a bath. We conclude this evidence is legally and factually sufficient to show appellant committed the offense of capital murder. *See Jackson*, 443 U.S. at 319; *Johnson*, 23 S.W.3d at 11. We overrule appellant's first and second issues.

In her third issue, appellant argues the trial court erred in submitting to the jury an instruction on the law of parties because there is no evidence to show that her husband murdered the baby or that she acted with intent to promote or assist her husband in murdering the baby. A person is criminally responsible for

an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Tex. Pen. Code Ann. § 7.02(a)(2) (Vernon 1994). Evidence is sufficient to support a conviction under the law of parties where the actor is physically present at the commission of the offense and encourages the commission of the offense either by words or other agreement. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). In determining whether a defendant participated in an offense as a party, the court may examine the events occurring before, during, and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to commit the offense. *Id.*

On the day of the murder, Casey Larowe, appellant's neighbor, heard some loud talking from appellant's apartment next door and went to investigate. Larowe looked in appellant's open doorway and saw appellant holding her baby and talking loudly in another language on the telephone. The baby was limp and unmoving, and Larowe stood in appellant's doorway and asked if she needed help. Appellant did not answer and remained on the telephone. Larowe, dressed in her nightgown, went back to her apartment and threw some clothes on.

Approximately two minutes later, Larowe returned to appellant's apartment and again

asked if appellant was okay. Appellant did not answer but, when Larowe said she was going to call 911, appellant said somebody knocked on her door, came in, took her baby, beat it and threw it outside. Larowe took the baby from appellant and put the baby on the couch. Throughout this exchange, appellant remained on the telephone. Larowe checked the baby for a pulse and found none. When Larowe tilted the baby's head back, her hand sank into the baby's scalp. Frantic, Larowe asked if appellant had called 911. Appellant did not respond. Soon thereafter, appellant's husband and daughter came in the door of the apartment, and appellant's husband did not pick up the baby but called someone on the telephone instead. Larowe could not understand what appellant's husband was saying. When appellant's husband got off the telephone, Larowe called 911 and remained in the apartment until police and paramedics arrived.

Appellant argues there is no evidence to show her husband murdered the baby, and an instruction on the law of parties was therefore inappropriate. Although appellant's husband was not present in the apartment when Larowe came to investigate appellant's loud talking, the baby had already suffered a massive head wound and stopped breathing by that time. We have already concluded the evidence was legally and factually sufficient to show appellant murdered her baby. If the evidence clearly supports appellant's guilt as a principal actor, any error in charging on the law of parties is harmless. *Black v. State*, 723 S.W.2d 674,675

(Tex. Crim. App. 1986); *Reyes v. State*, 910 S.W.2d 585, 593 (Tex. App.-Amarillo 1995, pet. ref'd). In addition, we conclude a rational jury could have found beyond a reasonable doubt that, if appellant did not murder her baby, she encouraged, aided, or directed her husband to do so. *See Ransom*, 920 S.W.2d at 302. We overrule appellant's third issue.

In her fourth issue, appellant argues the trial court erred in overruling her objection to the submission of the law of parties because she was not under a legal duty to prevent a criminal offense against her baby. In her fifth issue, appellant makes the related argument that family code section 151.001 is unconstitutionally vague in imposing on a parent a duty of "protection" of the parent's child. The penal code provides that a person is criminally responsible for an offense committed by the conduct of another if, having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense. Tex. Pen. Code Ann. § 7.02(a)(3) (Vernon 1994). The jury instructions in this case, quoting section 151.001 of the Texas Family Code, stated that a parent has "the duty of care, control, protection of the child, and reasonable discipline of the child." *See* Tex. Fam. Code Ann. § 151.001(a)(2) (Vernon Supp. 2002). The charge further instructed the jury to find appellant guilty of capital murder if it found beyond a reasonable doubt that appellant's husband killed the baby and appellant, "having a legal duty to prevent

commission of the offense and acting with intent to promote or assist its commission, failed to make a reasonable effort to prevent commission of the offense." *See* Tex. Pen. Code Ann. § 7.02(a)(3) (Vernon 1994).

Appellant argues it is contrary to the intent of the family code to impose on a parent the legal duty to protect a child from the commission of a criminal act by a third party. However, the charge in this case does not impose such a duty. Instead, the charge authorized a conviction only if, having a legal duty to prevent commission of the offense and *acting with intent to promote or assist its commission*, appellant failed to make a reasonable effort to prevent the offense. We conclude that, to authorize a conviction, this instruction required appellant to have the intent to promote or assist her husband in murdering her baby and, contrary to appellant's arguments, did not unreasonably require appellant to protect her child from every potential threat to avoid prosecution for capital murder.

Appellant complains further that the language referring to "protection of a child" is impermissibly vague. A statute is void for vagueness when it fails to give a person of ordinary intelligence fair notice of what the statute requires or is so indefinite that it encourages arbitrary arrests and convictions. *See Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996). We conclude that the language referring to "protection of a child" gave fair notice that appellant should not feed her

> baby ground glass, strangle her baby with a ligature, or crush her baby's skull, nor should she permit another individual to do so. We overrule appellant's fourth and fifth issues.
>
> * * *

We affirm the trial court's judgment.

Kavali v. State, No. 05-01-00835-CR (Tex. App.–Dallas November 4, 2002, pet. ref'd).

Federal Habeas Corpus Relief

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1354, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 479-80, 116 L. Ed.2d 385 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996). In the course of reviewing state proceedings, a federal court does not sit as a super state appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

The prospect of federal courts granting habeas corpus relief to state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996. The new provisions of Section 2254(d) provide that an application for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in state court

proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See Williams v. Taylor*, 529 U.S. 362, 402-03, 120 S. Ct. 1495, 1517-18, 146 L. Ed.2d 389 (2000); *Childress v. Johnson*, 103 F.3d 1221, 1224-25 (5th Cir. 1997). The statutory provision requires federal courts to be deferential to habeas corpus decisions on the merits by state courts. *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002).

A decision by a state court is "contrary to" the Supreme Court's clearly established law if it "applies a rule that contradicts the law set forth in" the Supreme Court's cases. *Williams*, 529 U.S. at 405-06. A federal court's review of a decision based on the "unreasonable application" test should only review the "state court's 'decision' and not the written opinion explaining that decision." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*). "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas corpus court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Rather, that application must be objectively unreasonable. *Id.* at 409. The standard is satisfied only if "reasonable jurists considering the question would be of one view that the state court ruling was incorrect." *Davis v.*

Johnson, 158 F.3d 806, 812 (5th Cir 1998) (internal quotation marks and citations omitted).

The trial court's factual findings are entitled to a presumption of correctness unless the petitioner can rebut the presumption with clear and convincing evidence to the contrary. *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001). A federal district court must be deferential to state court findings supported by the record. *See Pondexter v. Dretke*, 346 F.3d 142, 149-152 (5th Cir. 2003). A state application denied without written order by the Texas Court of Criminal Appeals, as in the present case, is an adjudication on the merits. *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an adjudication on the merits while a "dismissal" means the claim was declined on grounds other than the merits).

Interpreter

In her first issue, Petitioner asserts that she was denied the right to confront witnesses and a fair trial when the trial court did not appoint a qualified interpreter. She raised the same issue in her state court writ application. *See Ex parte Kavali*, Application No. 60,986-01 at 10, 106.

The failure to grant a motion to appoint an interpreter when a criminal defendant does not understand and speak the English language can violate Texas law and implicate both the due process and confrontation clauses of the Texas and United States Constitutions. *See Van Nguyen v. Cockrell*, 2003 WL 21295077 (N.D. Tex May 29, 2003) (not

reported in F. Supp.2d). The Fifth Circuit held in 1982 that the petitioner was not denied due process of law and the right of confrontation by the trial court's failure to *sua sponte* appoint an interpreter for the petitioner, where it was clear that the petitioner had sufficient command of English to request an interpreter, but did not do so. *See Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982). Further, where the defendant did not apprise the trial court of any language difficulty, the trial court's failure to provide an interpreter can be grounds for reversal only if the defense can show prejudice. *Id.*

The state habeas court entered findings of fact on the issue of an interpreter:

1. Applicant was born in India and her native tongue is the Telegu dialect.

2. Applicant is not indigent and has enjoyed retained counsel throughout these criminal proceedings.

3. At her bond hearing, Applicant's husband translated for her. *See* State's Habeas Exhibit "A."

4. Applicant speaks and understands some English. *See* State's Habeas Exhibit "B" (Affidavit of D. Mulder). During trial preparation, Applicant conversed in English with her trial counsel. *Id.*

5. For the purposes of trial, Applicant required a translator. *Id.* At her counsel's suggestion, she furnished her own

translators who spoke her native tongue. *Id.* *See* Applicant's Exhibits Nos. 5, 6, 10, 11.

6. At the beginning of jury selection, Applicant's husband translated for her. A friend of Mr. Kavali, Venkatta Kolli, translated for the remainder of jury selection. At trial, another friend of Mr. Kavali, Radhika Kedela, translated. *See* Applicant's Exhibits Nos. 5, 6, 10, 11.

7. Counsel advised the translators that they were to translate without interpreting, digesting, or generalizing. *See* State's Exhibit "B." Applicant selected competent translators so she could hear and understand the proceedings. *Id.*

8. None of Applicant's translators indicate that Applicant requested them to translate anything more than they did translate. *See* Applicant's Exhibits Nos. 5, 6, 11.

9. Applicant's husband provided her with a general idea of what was happening. *See* Applicant's Exhibit No. 6. Also, her primary translator at trial, Kodela, summarized three quarters of the testimony. *See* Applicant's Exhibit No. 11.

10. During trial, counsel learned that Applicant had instructed her translator not to translate portions of the testimony. *See* State's Exhibit "B." But she also asked counsel appropriate questions about the

proceedings and was attentive to the proceedings. *Id.*

11. Applicant never advised counsel that she did not understand the proceedings, and none of the translators indicated that they could not communicate with Applicant. *Id.* She even concedes that her interpreters gave her a general idea of what was happening. *See* Applicant's Exhibit No. 5.

12. Because Appellant's trial counsel had extensively consulted with her prior to trial, counsel did not require the input of Applicant to advocate the defense at trial. *See* State's Habeas Exhibit "B." Counsel's ability to conduct effective cross-examination was not hampered by Applicant's inability to understand any part of the proceedings. *Id.*

13. The testimony of no less than eight law enforcement and medical professionals and the fact that Applicant's English-speaking neighbor communicated with Applicant before trial reflects that Applicant possessed quite a high level of English comprehension and some ability to communicate in English. 3 RR 34-36, 89, 96, 110-23, 134, 138-41, 208-10, 217-18, 225-26, 4 RR 25, 28, 185, 211, 215-16, 5 RR 7, 15-16, 1 CR 159, 169.

14. At jury selection, Applicant's translator was tardy so Applicant's husband translated for her. *See* State's Exhibit "B."

15. During trial, Applicant and her husband remained together when arriving or leaving the courthouse and during the recesses. *Id.*

16. Applicant neither requested a translator during trial nor indicated at trial that she did not understand any of the proceedings.

17. The affidavit of Ms. Smith throws no light on Applicant's understanding of her trial where she had translators available to her. *See* Applicant's Exhibit No. 21 (number designated by the State). Applicant's ability to comprehend matters in the prison system without translators after her trial is a separate unconnected matter. Further, in light of the testimony at trial and her trial counsel's statements, it appears that initially Applicant successfully concealed her understanding of English from the staff at TDCJ-CID.

18. Mr. Udashen's opinion that Applicant could not understand the English used during the trial does not assist in resolving the issue at hand. He was retained to represent Applicant after her conviction, and he does not assert that he was present throughout Applicant's trial. *See* Applicant's Exhibit No. 4.

19. Applicant has not identified any specific, material testimony or proceedings that she did not understand at trial. *See* Applicant's Exhibit No. 5. Accordingly, she has not

demonstrated any harm flowing from any untranslated event at trial.

20. As is the case with any other defendant on trial, Applicant understood the trial proceedings to the extent she wished to do so at the time. *See* State's Habeas Exhibit "B."

Ex parte Kavali, Application No. 60, 986-01 at 252-54.

The Texas Court of Criminal Appeals adopted these findings when it denied Petitioner's state habeas application without written order. These findings are presumptively correct under 28 U.S.C. § 2254(e)(1). *See Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.) *cert. denied*, 531 U.S. 831, 121 S. Ct. 84, 148 L. Ed.2d 46 (2000). Therefore, federal courts in habeas corpus proceedings are required to accord a presumption of correctness to state court findings of fact, unless they lack even fair support in the record. *See Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S. Ct. 2223, 109 L. Ed.2d 762 (1990). The Fifth Circuit has confirmed that "any state-court factual determinations must be presumed correct unless rebutted by clear and convincing evidence." *Davis v. Johnson*, 158 F.3d 806, 812 (5th Cir. 1998). Thus, in the absence of affirmative proof of error, the state court findings are deemed to be correct. *See Teague v. Scott*, 60 F.3d 1167, 1170 (5th Cir. 1995). Mere disagreement with the state court findings is not sufficient to overcome those findings, even when the record is ambiguous. *Id.* However, section 2254 (d) (2) authorizes issuance of a writ if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented." *Childress v. Johnson*, 103 F.3d 1221, 1226 n. 7 (5th Cir. 1997).

In the present case, Petitioner had a reasonable command of the English language, evidenced by the affidavits of her trial attorneys and the various police and medical personnel with which she conversed. Her attorneys stated that she asked questions in English and responded appropriately to answers given in English. While not fluent, the attorneys believed that Petitioner understood the trial proceedings and appeared to understand matters discussed with her in English. She never stated that she did not understand the proceedings or was receiving an insufficient translation.

Furthermore, the record demonstrates that Petitioner's friends and family interpreted proceedings for her during the trial proceedings. The only portions that were not interpreted were at Petitioner's request – testimony concerning the injuries to her child. Thus, with an absence of affirmative proof of error, the state court findings are deemed to be correct. *See Teague*, 60 F.3d at 1170.

Petitioner's claim is also barred by *Teague v. Lane* to the degree that her petition complains about the trial court's failure to appoint an interpreter. *See Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed.2d 334 (1989). The Supreme Court has never held that a defendant who is not indigent is entitled to a court-appointed interpreter, particularly when the defendant does not testify. If this Court determined that Petitioner, who is not indigent, was constitutionally entitled to have a court-appointed translator translating during her trial, it would constitute a new rule being announced in a habeas corpus case, which would be barred by *Teague*.

Moreover, the record fails to show that Petitioner or her counsel, at any time during trial proceedings, requested an interpreter. Further, even if it could be found that the trial court should have appointed an interpreter *sua sponte*, Petitioner has failed to show the required prejudice. Denial of the right to confrontation is subject to a harmless error analysis. *See United States v. Jimenez*, 464 F.3d 555, 558 (5th Cir. 2006). Petitioner's attorneys stated that the use of the interpreters did not negatively impact their ability to defend Petitioner at trial. Further, Petitioner does not pinpoint the testimony that she was unable to respond to based on the lack of a court-appointed interpreter nor how it would have made a difference in the outcome of the trial.

Petitioner has not shown that the state court proceedings (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See Williams*, 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25. Petitioner's issue lacks merit.

Ineffective Assistance of Counsel

Legal Standard

In order to succeed on a claim of ineffective assistance of counsel, a habeas corpus petitioner must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms

prevailing at the time counsel rendered assistance. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed.2d 864 (1984). The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *see also Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). Secondly, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Petitioner must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.* at 697. Without a showing of prejudice, a claim of ineffective assistance fails.

Analysis - Failure to Object to Prosecutor's "Misstatement of Law"

Petitioner claims that her trial counsel was ineffective by failing to object to improper jury argument. Specifically, she complaints about the following statement made by the prosecutor during closing:

> He's asking you to forget your common sense, and that's one of the most important things here, is your common sense. Finding her guilty

> as the principal, that she did it, or finding her guilty as a party if for some reason you do not want to believe this crazy, made-up story. Even if you believe that she assisted, aided and abetted, because you get to look at before, after and during the commission of the crime. After the crime she's assisting by creating his alibi. She's assisting by telling the police this is what happened. She's assisting by doing that. If you want to believe, for some reason that crazy story, she's still guilty as a party.

6 RR 33. Petitioner asserts that this statement misstated the law contrary to the court's charge and must be reversed.

Under Texas law, a misstatement of the law is improper jury argument. *See Burk v. Dretke,* 2003 WL 22364421, *5 (N.D. Tex. (Oct. 14, 2003) (citing *Ex parte Drinkert*, 821 S.W.2d 953, 957 (Tex. Crim. App. 1991). However, improper argument does not require reversal unless it affects a substantial right of the defendant. Tex. R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S. Ct. 1710, 1714, 123 L. Ed.2d 353 (1993); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)).

The state habeas court found the following:

1. In the course of testimony, the defense promoted the theory that someone had

invaded Applicant's home and killed her baby. 3 RR 89, 111-15, 208-11, 217.

2. During closing argument, however, the defense argued that Applicant's husband was actually responsible for the crime. 6 RR 27-30.

3. In rebuttal, the prosecutor asked the jury to focus on Applicant's guilt as the primary actor. Alternatively, if the jury believed Applicant's argument, the prosecutor requested that the jury consider her a party to the offense. 6 RR 33.

4. In context, the prosecutor's argument was a response to the surprise argument of the defense that Applicant's husband killed the baby and manufactured an alibi for himself.

Ex parte Kavali, Application No. 60, 986-01 at 254. When the Texas Court of Criminal Appeals denied Petitioner's state habeas application, it adopted these findings, which are presumed correct. *Clark*, 202 F.3d at 764. Further, the prejudicial effect, if any, of the complained argument to Petitioner was slight as the court's charge was clear and gave instructions concerning the alternative charges. The jury was instructed on the law of parties. Moreover, the jury was also instructed to disregard any statement of law made by counsel that was not in harmony with the law stated in the jury charge. Even if the prosecutor's argument was incorrect, the jury would have disregarded it as required by the court's charge. When determining whether specified errors resulted in the required prejudice, a court should presume that the

jury acted according to the law and "that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland*, 466 U.S. at 694-95. Thus, even if counsel had properly objected and preserved error, it is unlikely that Petitioner would have obtained a reversal of her conviction on this basis. She has failed to show prejudice.

The question to ask when a petitioner challenges her conviction is whether, absent counsel's errors, the factfinder would have had a reasonable doubt about the petitioner's guilt. *Strickland*, 466 U.S. at 695. The record shows that Petitioner stated that she left the baby while she went to the bathroom for a few minutes and an intruder came in and killed him. Her husband was not home at the time. However, autopsy results showed that the baby had glass in his digestive system. The same glass fragments were found in a mortar and pestle at Petitioner's home, in the traps to the sink, and in the vacuum cleaner bag. The baby had been strangled and he had suffered a severe blow to his head. In spite of the severe head wound, there was no blood in the front room or on the front porch, the places Petitioner stated that she left the baby before going to the bathroom and where she found him a few minutes later. It was also noted that the baby's face was very clean, as if it had just been bathed. The state court reasonably rejected Petitioner's claim in light of the evidence presented.

Petitioner has not shown that the state court proceedings (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in

a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See Williams*, 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25. This issue lacks merit.

Analysis - Failure to Object to Prosecutor's References to Indian Culture

Petitioner asserts that trial counsel was ineffective for failing to object to the prosecutor's questioning during voir dire and his statement during closing concerning alleged cultural beliefs of Indians. Specifically, she complains that trial counsel should have objected when the prosecutor asked a prospective juror to assume that a couple had "a religious or cultural belief that a baby with a defect or some type of deformity is . . . better off dead [so] . . . they kill the baby." Additionally, Petitioner asserts that trial counsel was ineffective for not objecting to improper prosecutor argument in closing when the prosecutor said, "in the United States you don't have that right . . . to choose to get rid of the problem."

Claims of prosecutorial misconduct are determined on a case by case basis. *Stahl v. State*, 749 S.W.2d 826, 830 (Tex. Crim. App. 1988). Prosecutorial misconduct has been found where the prosecutor's actions deliberately violated an express court order and where the prosecutor's misconduct was "so blatant as to border on being contumacious." *Id.* at 831. It may also be shown where the prosecutor asks a question that is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced. *See United States v. Saenz*, 747 F.2d 930, 939 (5th Cir.

1984); *Huffman v. State*, 746 S.W.2d 212, 218 (Tex. Crim. App. 1988).

Where improper prosecutorial argument is asserted as a basis for habeas relief, "it is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2462, 2471, 91 L. Ed.2d 144 (1986). Rather, the relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* In order to constitute a denial of due process, the acts complained of must be of such character as to necessarily prevent a fair trial. *Nichols v. Scott*, 69 F.3d 1255, 1278 (5th Cir. 1995). Moreover, the burden is on the habeas petition to show a reasonable probability that, but for the remarks, the result would have been different. *Id.*

The state habeas corpus court made the following findings of fact on this issue:

1. Applicant is a native of India.

2. The culture, religion, customs, and habits of Indians are different from those of Americans. One Indian custom is to smash a coconut on the ground, as Applicant and her husband did outside their apartment on returning from the hospital. 5 SF 66, 69, 72.

3. Prior to Applicant's baby's murder, he was fed ground-up glass. 5 RR 39043, 45, 46, 52, 60.

4. The State's theory of the case that even if, as Applicant told police, someone else strangled the baby and crushed his head, Applicant fed him the glass. 3 RR 16-19; 5 RR 72; 6 RR 7-8, 10-13, 34, 36, 41.

5. The prosecutors were concerned that the defense could attempt to explain away the feeding of the glass as an Indian ritual and, if not rebutted by the State, make hay from the State's failure to prove the event was not a ritual.

6. During jury selection, one of the venirepersons raised the subject of religious beliefs when the prosecution was discussing excuses for a killing.

7. At trial, the defense raised the topic of Indian culture on cross-examination. 4 RR 206; 5 RR 73. Other references occurred thereafter. 4 RR 210; 5 RR 17, 24.

8. The State attempted to present the testimony of Professor Joseph Elder, who has forty years' experience in the languages and culture of Asia. 5 RR 62. After a hearing, the Trial Court excluded the testimony of Professor Elder. 5 RR 64-73.

9. During closing argument, the defense urged the jury to understand that, as a function of Indian culture, Applicant was dominated by her husband. 6 RR 25-26. Basically, the defense would have the jury believe she was a victim of her husband's manipulation to

protect himself after he murdered Venkateswar.

10. The prosecutors responded by explaining that whatever her husband's motive's (sic) for wanting the baby dead, under the law in America. she could not comply with his wishes without legal consequences.

11. Placed in proper context, the prosecutors did not "improperly suggest that Indians have a religious or cultural belief that a defective baby is better off dead, that Applicant acted on this belief in killing her baby, and the jury should convict her" because it could not be tolerated in the United States.

12. The prosecutor's' references to culture or religion were designed to eliminate them as a factor in the case.

13.. Because the hearing on the admissibility of Professor Elder's testimony was conducted out of the jury's presence, the jury could not have known that he had knowledge about Indian religion or culture.

14. The State did not make any appeal, direct or subtle, to racial prejudice.

15. Applicants' (sic) counsel were not under any obligation to object to the prosecutor's questions or comments.

Ex parte Kavali, Application No. 60, 986-01 at 255-56.

The Texas Court of Criminal Appeals explicitly adopted these findings when it denied Petitioner's state habeas application without written order, and they are presumed correct under 28 U.S.C. § 2254(e)(1) in the absence of affirmative proof of error. *See Clark*, 202 F.3d at 764; *see also Teague*, 60 F.3d at 1170. As the State did not make any appeal to racial prejudice, trial counsel was not obligated to object.

Furthermore, Petitioner has not shown that the state court proceedings (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See Williams*, 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25. Petitioner's issue lacks merit.

Analysis – Counsel's Failure to Present Expert Testimony About Blood and DNA Evidence

Petitioner's last assertion for relief is based on the trial counsel's failure to present expert testimony to explain how Petitioner could have been the source of the blood on the carpet in the master bedroom that contained the baby's DNA. Following are the findings from the state habeas court on this matter:

1. Police collected three drops of blood from the Kavali's master bedroom carpet. 4 RR 116.

2. DNA testing of the drops revealed that (1) the deceased was a major contributor to each drop, (2) Applicant's husband was excluded

as a contributor to any of the drops, and (3) Applicant or her daughter could not be excluded as minor contributors to each drop. 5 RR 94-101.

3. The DNA expert recognized that the DNA may have been deposited by various vehicles: blood, saliva, urine, or soughed-off cells. 5 RR 109-11. No time frame could be established for the deposits or the order of deposits. 5 RR 115.

4. Trial counsel, as a matter of strategy, decided it was unnecessary to explain the blood drop evidence. *See* State's Habeas Exhibit "B." The evidence neither inculpated Applicant nor exculpated her husband. *Id.* Simply, the evidence was not inconsistent with the defense theory. *Id.*

Ex parte Kavali, Application No. 60, 986-01 at 256-57.

When the Texas Court of Criminal Appeals denied Petitioner's state habeas application, it adopted these findings. *Clark*, 202 F.3d at 764. Any factual determinations from the state court must be presumed correct unless rebutted by clear and convincing evidence. *Davis*, 158 F.3d at 812. Thus, in the absence of affirmative proof of error, the state court findings are deemed to be correct. *Teague*, 60 F.3d at 1170.

Furthermore, in support of their trial strategy, defense counsel Mulder explained in an affidavit:

> The analysts conceded that the DNA from the possible minor contributors was not necessarily of blood source but could have come from other soughed cells containing DNA. They further conceded that all DNA wasn't necessarily contributed and deposited at the same time. . . . In my judgment, then and now, there was no necessity to explain the blood drops. The analysts didn't testify that Ms. Kavali's DNA was present, only that she or her daughter were possible contributors. The blood drop evidence was not inconsistent with our defensive theory in that no reasonable interpretation of the blood drops excluded Mr. Kavali as the perpetrator or inculpated Ms. Kavali. Some evidence (from a defense strategy) is best left unexplained.

Ex parte Kavali, Application No. 60, 986-01 at 242. Defense counsel Nation presented the same viewpoint. *Id.* at 245-46. Petitioner has failed to show that trial counsel's strategy was erroneous. Even if it could be considered to be in error, Petitioner has likewise failed to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Petitioner has not shown that the state court proceedings (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See Williams*, 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25. Petitioner's issue lacks merit.

Conclusion

When the effectiveness of counsel is at issue, state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254 (e)(1). *See Strickland*, 446 U.S. at 698; *Davis*, 158 F.3d at 812. When a state court has determined that counsel was reasonably effective, federal courts "look to whether the state court decision rested on 'an unreasonable application of clearly established federal law.'" *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). In the instant case, Petitioner had the burden of rebutting such findings by producing clear and convincing evidence that they are incorrect. 28 U.S.C. § 2254(e)(1). She has not done so. The trial court's findings are amply supported by the record. This Court, therefore, is required to accept as conclusive both the factual findings and the credibility choices of the state courts. *See Carter v. Collins*, 918 F.2d 1198, 1202 (5th Cir. 1990).

Petitioner is not entitled to relief because she has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. *See Williams*, 529 U.S. at 402-03. Accordingly, her petition should be dismissed.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether she would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the

petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

It is respectfully recommended that reasonable jurists could not debate the denial of the Petitioner's § 2254 petition on procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 134, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is recommended that the Court find that the Petitioner is not entitled to a certificate of appealability as to her claims.

Recommendation

It is therefore recommended that the petition be dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual

findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 26th day of February, 2008.

/s/
DON D. BUSH
UNITED STATES MAGISTRATE JUDGE